

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In THE MATTER OF

**PETITION FOR DECLARATORY RULING
AND CONTINGENT PETITION FOR PRE-
EMPTION OF GREAT LAKES
COMMUNICATIONS CORP. AND
SUPERIOR TELEPHONE COOPERATIVE**

WC Docket 09-152

REPLY COMMENTS OF LEVEL 3 COMMUNICATIONS LLC

I. INTRODUCTION

The concept of “traffic pumping” has become a scourge for the nation’s telecommunications industry. This form of regulatory arbitrage combines one-way high-volume traffic, non-negotiated exorbitant access charges, the arcane rules which allow a carrier to “opt out” of the NECA pool and the sharing of that revenue between the terminating carrier and its “customer.” When these entities begin receiving calls, the interexchange carriers are left with rate shock as the terminating costs for these calls soar. When those carriers object, the terminating carriers stand behind concepts such as the “filed rate doctrine” to enforce the tariff obligations or pursue other regulatory avenues to keep their business scheme alive. That is what has happened in this case where a number of rural local exchange carriers cavalierly suggest that the refusal to pay their outrageous invoices is unlawful “self help” – while they help themselves to windfall profits by gaming a system designed to protect end users in high-cost rural areas.

Faced with a pending decision from the Iowa Utilities Board ("IUB") that would kick the legs out from under their scheme, Great Lakes Communications Corp. and Superior Telephone Cooperative ("Joint Petitioners") filed a Petition for Declaratory Ruling and Contingent Petition for Pre-emption ("Petition") asking the Commission to prevent the IUB from issuing its decision. That filing was premature since the IUB had not issued its order. The only record cited by the Joint Petitioners was their own interpretation of the bench rulings and excerpts from the transcript.

On the day initial comments were due the IUB released its written order.¹ Level 3 withheld its initial comments so that it could review the order. Having done so, Level 3 submits these reply comments urging the Commission to dismiss the Petition. The IUB order does not rest on any federal questions but instead on interpretation of Iowa law and the IUB's powers to enforce the law and its rules. That leaves the Petition without any merit.

While Level 3 urges the Commission to reject the petition, the Commission must act expeditiously here or in another docket to eliminate traffic pumping or risk that form of regulatory arbitrage further weakens the broad telecommunications industry, and continues to artificially prop up the narrow "business" practice of generating cash for the support of free conference calling services.

II. THE FINAL IOWA ORDER

The IUB's Final Order was the culmination of a two-year investigation into traffic pumping. The investigation began when Qwest Communications Corp. ("Qwest") filed

¹ In Re: Qwest Communications Corporation vs. Superior Telephone Cooperative; The Farmers Telephone Company of Riceville, Iowa; The Farmers & Merchants Mutual Telephone Company of Wayland, Iowa; Interstate 35 Telephone Company d/b/a Interstate Communications Company; Dixon Telephone Company; Reasonor Telephone Company LLC; Great Lakes Communications Corp; and Adventure Communication Technology, LLC. Docket No. EC11-07-2. Final Order, released September 21, 2009. "Final Order".

complaints against eight Iowa telephone companies alleging violations of the Iowa Telecommunications Association Tariff No. 1 and Iowa law.² AT&T and Sprint joined the complaint. The Final Order is an indictment of the business plan and tactics of the eight local exchange carriers:

QCC alleges that the Respondents in this case attempted to manipulate the access charge regulatory system in order to collect millions of dollars from interexchange carriers (IXCs) at rates that far exceeded the cost of providing switched access services. They started with access rates that were indirectly based on their cost of providing low volumes of access services, then entered into agreements with free conference calling companies that were intended to increase traffic volumes by 10,000 percent or more at the same rates, when the total cost of providing access services had not increased significantly.

In this order, the Board finds that the Respondents failed to comply with the terms and conditions of their own intrastate access tariffs, so the calls in question were not subject to access charges and refunds and credits are required. The conference calling companies were not "end users" as defined in the access tariffs because they did not order, purchase, get billed for, or pay for local exchange services. Calls to the conference bridges were not terminated at the end user's premises, as required by tariff. Many of the calls were laundered in an attempt to make it appear they were terminated in one Respondent's exchange, when in fact they were terminated in another exchange where the Respondent was not authorized to provide service.

When QCC filed complaints with the Board and with the Federal Communications Commission (FCC)(sic), some of the Respondents attempted to manufacture evidence to make it appear that they had complied with their tariffs when they had not.

Based on the record in these proceedings, the Board finds that the *intrastate* interexchange calls to the conference calling companies were not subject to access charges. (emphasis added.) Refunds and credits to the IXCs are ordered. The Board also announces that it is initiating a proceeding to consider proposed rules intended to prevent this abuse in the future.³

The 81-page Final Order is not based on usurping the authority of the Commission, as Great Lakes and Superior allege, but instead upon Iowa law. It is fact specific and focuses on the conduct it discovered during the complaint process. In its initial

² See Iowa Code §§ 476.2, 476.3 and 476.5; 199 IAC chapters 4 and 7; and IAC 22.14.

³ Final Order, "Summary" at 2.

comments, the IUB acknowledges that the Joint Petitioners assumed in their Petition that the IUB would grant all the relief that Qwest sought. The Board, however, recognized its jurisdictional limits and focused only on intrastate issues.⁴

III. THE JOINT PETITION IS MOOT AND SHOULD BE DISMISSED

Level 3 agrees with a number of parties that the Petition for Declaratory Relief is moot since the IUB issued its Final Order. AT&T is correct to call the Petition “frivolous”.⁵ Level 3 also agrees that the Petition was premature and is now moot. Verizon and Verizon Wireless⁶, Qwest and Sprint all called the Petition premature since the Final Order had not been issued and there was no way to determine whether the IUB would exceed its authority. The Final Order shows that the IUB did not exceed its authority and instead recognized its jurisdictional limitations.

In addition to being premature, the Joint Petition is procedurally suspect. As Sprint points, “an adjudicatory order - and under Section 551 of the Administrative Procedure Act, 5 U.S.C. §551, a declaratory ruling is an adjudication - must be based upon facts and not upon mere speculation.”⁷ Now that the facts are available and it is clear that the IUB did not rule on any interstate matters, any further action is unwarranted. Any party objecting to it can seek reconsideration from the IUB. In the event they are not satisfied by the outcome of that action, they can then appeal that order to the appropriate state court. Allowing this Petition to remain open will inject unnecessary issues of pre-emption and regulatory gamesmanship into the controversy. The Commission should not allow the Joint Petitioners to use these tactics to complicate this dispute.

⁴ Petition for Declaratory Ruling, Initial Comments of the Iowa Utilities Board, p. 3 to 5.

⁵ AT&T, Initial Comments at p. 1.

⁶ Verizon and Verizon Wireless, Initial Comments, p.3-7; Qwest Initial Comments at p. 1; and Sprint Initial Comments.

⁷ Sprint comments at p. 2 citing *First Bancorporation vs. Board of Governors of the Federal Reserve System*, 728 F.2d 434 (10th Cir. 1984).

IV. THE JOINT PETITIONERS' CLAIMS OF PREEMPTION FAIL

Since the Final Order is based on Iowa law, it is ridiculous to argue, as Aventure does, that the Board's actions were "ultra vires."⁸ The IUB limited the scope of its written order to the question of whether imposition of excessive intrastate access charges constituted a violation of the carrier's tariffs and specific provisions of Iowa law. The IUB observed its jurisdictional limitations by basing its findings on the relevant Iowa law or tariff and by limiting the refunds and credits to intrastate traffic. It did not order refunds for interstate traffic. The Joint Petitioners cannot sustain any argument that the IUB acted outside its authority.

Unable to show that the Final Order is not based on Iowa law or regulations, Aventure casts a wide net and argues that any action at the state level impinges on the jurisdiction of the Commission. Aventure tries to support their position arguing that the IUB has improperly opined on interstate access rates, the interpretation of language that is identical in the state and federal tariffs, the Commission's "rural exemption", the assignment of telephone numbers and the treatment of international Voice over IP traffic.

Those arguments are without merit. It is preposterous from a policy perspective that language in a state tariff that matches language in a federal tariff cedes primary jurisdiction over that language to the other agency. In Aventure's world, neither a state or federal regulatory body would have the ability to interpret such language within the appropriate jurisdictional requirements. A local exchange carrier receiving an adverse ruling or interpretation will just claim that language has already been interpreted by another agency.

⁸ Aventure Initial Comments at p. ii.

In the case before the IUB, the tariff in question was a state tariff. The Final Order rests on its interpretation of an intrastate tariff, not an interstate tariff. Questions concerning the rural exemption or the “federal” treatment of international or VoIP treatment were not addressed. The IUB discusses those types of traffic only to analyze where the calls terminated. The IUB found, “The intrastate toll traffic, including international, calling card, and prerecorded playback calls, did not terminate within the Respondents’ certificated local exchange access areas and were not subject to intrastate terminating access charges.”⁹

In addition, the IUB was careful to highlight that the rural exemption issues raised by Qwest were interstate in nature and that a “finding by the Board on this matter would be inappropriate. The FCC will be informed of this situation by this Order and may take action, if appropriate.”¹⁰ The IUB took the same path with respect to information it received indicating possible violations the Federal Universal Service support mechanism.¹¹ These findings reiterate the premature nature of the Joint Petition and require the Commission to dismiss it.

V. INTERSTATE TRAFFIC PUMPING REQUIRES IMMEDIATE ATTENTION FROM THE COMMISSION

Whether a party supports the Joint Petition or believes it should be dismissed, all comments indicate a need for the FCC to address interstate traffic pumping issues. In the Final Order, the IUB opened a docket to consider the compensation and other issues surrounding high volume access customers.¹² That proceeding however will only address

⁹ Final Order, Findings of Fact, p. 78

¹⁰ Id at 69

¹¹ Id at 62.

¹² Id at 59.

intrastate calls and does not impact the remaining 49 states. The opportunity for abuse will remain on the interstate side unless the FCC acts immediately.

In its analysis, the IUB identified five concerns that create an “unreasonable practice” when access revenue is shared with a terminating carrier and a free conference call provider. The IUB found that when:

1. a carrier’s access rates are set with reference to a relatively low historical volume of access services;
2. the current and future volume of those services is considerably greater;
3. the incremental cost of increased traffic is less than the charge per minute;
4. the carrier is willing to share a substantial portion of its access revenues; and
5. the carrier has substantial market power, even monopoly power, over those services then the result is an unreasonable rate or service arrangement, in the absence of any other factors.¹³

Each of these concerns can be found when a local exchange carrier is willing to share its interstate access revenue whether on the originating or terminating end of the call. And as long as local exchange carriers in high cost areas can charge high access rates, the incentive exists to share that access revenue with a chat-line, adult content or conference calling provider in order to ratchet up traffic and revenues.

In the Final Order, the IUB used one example of how quickly the traffic volumes and subsequent financial burden on the interexchange carriers can rise when the customer is a free conference call provider. One company billed Qwest an average of less than 600,000 minutes per year before the local exchange carrier began providing services to a free calling conference service. In the following year, that same carrier billed Qwest for more than 60 million minute access minutes.¹⁴ If in this instance the rate charged by the Local Exchange Carrier is \$0.13 per minute for intrastate services, that interexchange carrier would see their access bill increase from \$78,000 a year to \$7.8 million assuming

¹³ Id. at p. 58

¹⁴ Id.

all the traffic was intrastate. Faced with soaring access bills, the interexchange carriers have resorted to what the Joint-Petitioners call “self-help” by disputing the validity of the invoices for this traffic and withholding payment. Based on this record it appears that there are as many as 17 different court cases pending involving the refusal of an interexchange carrier to pay traffic pumping charges. It further appears that some enhanced service providers have elected a different tactic to insulate themselves from these outrageous charges, and have elected to block the calls altogether. Commission precedent might otherwise evaluate withholding payment or blocking traffic harshly. Given the sheer magnitude of the fraudulent scheme present in these cases, however, requiring interexchange carriers to deliver the traffic, pay the bills and hope to one day recover the payments (from carriers who, if they are incorrect about the legality of their practices, likely have no business and no money left) is not a reasonable alternative.

This example highlights the need for the FCC to take action on interstate traffic pumping. Verizon and Verizon Wireless want the Commission to issue an order in the Access Stimulation Proceeding that it is an unjust and unreasonable practice for local exchange carriers to charge terminating interstate switched access charges on traffic that is subject to a revenue sharing arrangement.¹⁵ AT&T also calls for immediate action in the Access Stimulation Proceeding or the Commission’s reconsideration of the Farmers & Merchant Order.¹⁶

The ongoing nature of these sort of regulatory arbitrage schemes frustrate and make it harder for the Commission to reach its goal of reforming intercarrier compensation. The simple reality is that the longer such arbitrage schemes are allowed to

¹⁵ Verizon comments at 7.

¹⁶ AT&T comments at 6.

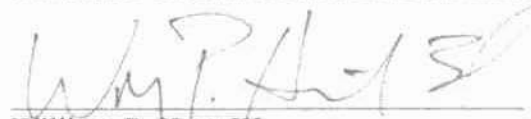
go uncorrected by the Commission, it creates a rich incentive for parties to engage in traffic pumping schemes. The longer the industry continues to fight over these excessive rates, the greater the damage to all parties involved.

VI. CONCLUSION

The Final Order is a fact-specific verdict based on Iowa law and violations of Iowa tariffs and follows a two-year investigation, a hearing and a mountain of evidence concerning the conduct of the eight carrier defendants. Faced with the reality of that record, those carriers ran to the Commission with the procedural goal of trying to stop the jury from issuing its verdict by concocting a theory without supporting facts. Now that the decision has been released, the Commission should not second guess the findings of the IUB but should instead dismiss the Joint Petition for Declaratory Action. At the same time, the Commission should examine the Final Order as a blue print to resolve the vexing problems raised by interstate traffic pumping.

Respectfully submitted

LEVEL 3 COMMUNICATIONS LLC

A handwritten signature in dark ink, appearing to read 'W. P. Hunt III', is written over a horizontal line.

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